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An Obscure Scandal of Consciousness

Anthony Chase

and now, divided—
with you—doesn't the world—or at least
that part which holds power—seem worthy only
of rancor and an almost mystical contempt?
Yet without your rigor, I survive because
I do not choose. I live in the non-will
of the dead postwar years: loving
the world I hate, scorning it, lost
in its wretchedness—in an obscure scandal
of consciousness. . . *

I. INTRODUCTION

This essay provides an introduction to American popular culture, specifically designed to be of use to those interested in evaluating the relationship between law, lawyers, and public consciousness or popular values as they have developed within American society.¹ It is fair to ask from the outset what possible justification there can be for devoting even a short essay like this one to such a project. One could quite easily argue that legal scholarship itself is governed by a popular front composed of orthodox as well as avant-garde scholars, united around a common purpose, equally committed to obscuring the identity and historical profile of those who actually hold power. Does not a focus upon lawyers and popular culture represent merely one more effort to avoid confronting any actual sociology of the system which the rulers manipulate to their advantage?

* P. Pasolini, *The Ashes of Gramsci*, Poems 11 (N. MacAfee trans. 1982).

1. For a bibliography of resources available for the study of law, lawyers, and popular culture, see Chase, *On Teaching Law and Popular Culture*, 3 Focus on Law Studies: Teaching About Law in the Liberal Arts 7, 8 (Spring 1988); works subsequently published or inadvertently omitted from the Focus bibliography include American Media and Mass Culture: Left Perspectives (D. Lazere ed. 1987); Bloomfield, *Law and Lawyers in American Popular Culture*, in C. Smith, J. McWilliams & M. Bloomfield, *Law and American Literature* 125 (1983); Rowe, *Power in Prime Time: Miami Vice and L.A. Law*, 33 Jump Cut 20 (Feb. 1988); Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. Miami L. Rev. 229 (1987); Heller, *The Secrets of Columbo*, 66 Telos 133 (Winter 1985-86); Zaslove, *In Search of Columbo*, 70 Telos 161 (Winter 1986-87); *Film and History* (Special Issue), 41 Radical Hist. Rev. 3 (April 1988); E. Long, *The American Dream and the Popular Novel* (1985); *Political Mythology and Popular Fictions* (E. Yanarella & L. Sigelman eds. 1988); T. Christensen, *Reel Politics* (1987); J. Cawelti, *Adventure, Mystery, and Romance* (1976); W. Westbrook, *Wall Street in the American Novel* (1980).

From "strict construction" through "deconstruction," the dominant tradition of American legal writing seems to have been devoted to futile efforts at ignoring social context, within which real power can be analyzed and countered.³ However oriented, is not writing about the relationship between law and popular culture simply one more example of otherwise unemployable, middle-class intellectuals accepting the transfer payments made possible by the university welfare system in exchange for the kind of obscure and pedantic research which promotes nothing at all save academic careers?⁸ Should we not regard popular culture itself as a scandal of at least some sort, a likely source of wretchedness, if not dementia, for any reasonably intelligent person seduced by its cheap attractions and ready allure?

The answer to questions like these must be found in the concrete work carried forward by people who write about law, lawyers, and popular culture. My view is that once sufficient time and care have been devoted to analyzing the emerging set of problems and materials which connect the world of popular art and everyday experience to that of legal institutions and practices, it will become apparent that useful contributions have been made to the sociology of culture, including legal culture. Understanding popular legal culture might even make possible more rigorous thinking about the relation between law, politics, and social change in the United States.

Let us briefly consider, then, the realm of "legal institutions and practices," in a readily accessible law review article. Jammed into a recent issue of *The Texas Law Review*, behind essays on loss causation in securities fraud litigation as well as unifying servitudes and defeasible fees in property law, I found a brief comment by labor law professor Julius Getman under the simple title, "Voices."⁴ Getman identifies several ways of talking about law which are also ways of approaching legal writing and education: professional voice, critical voice, scholarly voice, and human voice. While recognizing the obvious legitimacy of professional voice

2. Regarding law not as a system of social relations but, rather, a text in need of interpretation, legal scholars tend to "abet power's visceral escape from accountability." Chase, *A Note on the Aporias of Critical Constitutionalism*, 36 Buffalo L. Rev. (1988); see also West, *Adjudication Is Not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 Tenn. L. Rev. 203, 207 (1987).

Ironically, given the close relationship between law and the state, none of the dominant schools of American legal scholarship (from 'neutral principles' through Critical Legal Studies) has even begun to develop a coherent theory of state power. For scholars who have begun this task, however, see M. Carnoy, *The State and Political Theory* (1984); F. Block, *Revising State Theory: Essays in Politics and Postindustrialism* (1987); M. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, The Law, and Politics* (1988).

3. See R. Jacoby, *The Last Intellectuals: American Culture in the Age of Academe* (1987); Scialabba, *What are the Intellectuals Good For?*, 7 Grand Street 194 (Spring 1988); Wald, *Jacoby's Complaint*, 55 Radical Historians Newsletter 1 (May 1988); Lukes, Piccone, Siegel & Taves, *Roundtable on Intellectuals and the Academy*, 71 Telos 5 (Spring 1987); *Symposium on Russell Jacoby's The Last Intellectuals*, 73 Telos 167 (Fall 1987).

4. Getman, *Voices*, 66 Tex. L. Rev. 577 (1988).

within the law, Getman questions whether such an exclusive discourse is entirely adequate to prepare law students for the kind of advocacy, negotiation, and counseling responsibilities central to most legal practice.⁵ Professional voice within legal scholarship is equally suspect since its use “only rarely is as moving or interesting as the problems and human situations from which it derives.”⁶

Realistically anticipating sharp resistance by professional educators to his preference for human voice over the “respectable” alternatives, Getman nevertheless sticks to his guns and concludes his critique of elite discourse with the assertion that “[in] most cases, when we present our ideas in a form designed to separate us from the great mass of humanity, we are almost certain to obscure their meaning, limit their reach, and reduce their significance.”⁷

There remains a troubling feature to Getman’s endorsement of human voice, yet one which has the virtue of leading us into the realm of law and popular culture. While it is correct to suggest, as Getman does, that human voice often reveals truths unspoken by professional or scholarly discourse, the question remains: what are we to do with the conflicting experiences of reality reflected in different human voice accounts of the same world? The human voices which Getman permits to speak through his essay could seemingly be included among a harmonious chorus standing on the dais at the Democratic Party convention. Setting to one side the disparity between human voice and the predominant voices which characterize legal-academic speech, how do we evaluate the various claims to insight or veracity offered by contending instances of human voice critique? What if Getman’s human voice rendition of racial discrimination, for example, had come not from a civil rights lawyer but from the subjects of Vincent Crapanzano’s anthropological study of contemporary white South Africans, many of whose personal voices are raised in defense of apartheid?⁸ In other words, how do we know which all too human voice to trust?

One response to this problem is found in the classical integration of human voice with scholarly voice, well-represented in the grand style of American historical writing by William Appleman Williams. A more recent approach, illustrated by sociologist William J. Wilson in his powerful 1988 lecture at Harvard’s Kennedy School of Government provides a devastating and systematic critique in the scholarly voice, and then brings the entire analysis “back home” with a sudden transition into human

5. *Id.* at 579. See also Chase, *American Legal Education Since 1885: The Case of the Missing Modern*, 30 N.Y.L. Sch. L. Rev. 519 (1985); Chase, *Who Needs Information When You’re Working Underground? Legal Education, Social Context, and the Public Interest*, 12 Nova L. Rev. 55 (1987).

6. Getman, *supra* note 4, at 579.

7. *Id.* at 588.

8. V. Crapanzano, *Waiting: The Whites of South Africa* (1985).

voice at the conclusion. Wilson's utilization of field research at the most human level of struggle for survival perfectly reinforces his general claim that American social policy has been woefully misdirected in its search for a "culture of poverty" inherent in the life-style of the poor and should instead focus on the inevitable victimization inherent in the social and economic trap set for the poor by a racist system.⁹ Once it is fully realized how frequently professional, scholarly, and critical voices are used to obscure the truth of human voice accounts—and, also, fully understood how politically motivated such suppression can be—then it becomes possible to imagine a rehabilitation of formerly exclusive voices, now in conjunction with a radical project which combines different kinds of speech in a single message.

Another approach to this problem of conflicting human-voice accounts, one which also situates human voice in relation to a broader background of still intimately human speech, involves the notion of popular voice—the idea of human voice spoken through the media of American popular culture. The very prevalence of a culture across a range of social strata qualifies it as "popular" culture. Thus, in an important respect, popular voice by definition incorporates human voice. It is the immediate and the personal transposed from the private sphere to the public, from the isolation of the individual to the silver screen stretched across one entire wall of the theater, or via the glowing boxes bringing light to countless evening living rooms, where "the whole world is watching."¹⁰ Without in any way attempting to ignore the complexity of the process through which the personal or intimate voice, that is, the human voice, can become the soul of popular entertainment—in the hands of corporations or disc jockeys, advertisers or screenwriters, stand-up comics or network presidents (or ticket-takers at Disneyland)—we might find a way to integrate Getman's notion of human voice with an approach which remains concerned, in the end, with the big picture by focusing on popular culture and the way in which popular culture mediates the experience of law and legal institutions for most Americans.

II. LEARNING FROM EXPERIENCE: AMERICAN FILM SCHOLARSHIP

The general purpose of this essay is to provide a kind of map to orient the reader within the terrain of current popular legal culture in the United States. Although I will eventually move from the general to the particular,¹¹ (specifically, Scott Turow's bestselling novel, *Presumed In-*

9. See W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

10. Gitlin, *The Whole World Is Watching*, in *Transmission: Theory and Practice for a new Television Aesthetics* 63 (P. D'Agostino ed. 1985).

11. Cf. a comment by filmmaker Jean-Luc Godard: "Jean-Louis Baudry has published an article in *Les Lettres Françaises*. As I was reading it, I kept saying, 'This is really good writing! Here's a

nocent), I raise here the most visible cautionary flag that I am able to raise, with respect to the potential misuse of popular culture research. In particular, I can warn readers against analyses which pretend to show how popular legal culture is the essential ideological matrix within which Americans are duped into supporting a corrupt system of legal institutions. To me, the vistas opened up by popular culture research that demonstrates the way works of popular art often reflect social experience and patterns of organization of perception that otherwise might escape our view, remain limitless. But the pressure to manipulate analyses of popular culture in order to somehow validate errant notions about the role of ideological power in reproducing social reality is also limitless and the willingness to submit to such pressures may be considerable among legal intellectuals. There is no natural point where further attribution of legal ideology's capacity to dominate would be logically checked by common sense. Ideology "surpasses experience," as Parsons suggests, and the room to play out fantasies becomes infinite.¹²

Having made this essential point, I would like to proceed by doing something which is rarely attempted within legal scholarship, even while law school professors are rapidly integrating the approaches of other academic disciplines into the law school world: that is, assess the debates over method in other disciplines before adopting them uncritically, and thus perhaps avoid repeating the mistakes made by earlier scholars in other fields.

From the vantage point of the summer of 1988, historian Robert Sklar looked back over the previous fifteen or twenty years of American film teaching and scholarship, in some ways the entire modern history of this discipline within the academic community, and reported on the central controversy created by the introduction into film history of rather superficial models of Althusserian or Gramscian "ideological hegemony," a conception of the relation of film to society which radically simplified the film scholar's task. Sklar observes:

Imagine the potency of this conception for a hypothetical scholar steeped in theory, unfamiliar with the training historians receive in historiographic procedure (Thompson's notorious "historical logic"). Like an expressway elevated over a teeming city, Althusser's formulation might be seen to offer a royal road to cinema history without

guy who ought to write something on *Persona*. He'd do a really good job.' The thing is, the article I was reading was supposed to be an article on *Persona*." Bontemps et al., *Struggle on Two Fronts: A Conversation with Jean-Luc Godard*, *Film Q.*, Winter 1968, at 20, 26.

12. For more skeptical views of the significance of ideology than those popular among current critical texts, see 1 M. Mann, *The Sources of Social Power: A History of Power from the Beginning to A.D. 1760* (1986); J. Merquior, *The Veil and the Mask: Essays on Culture and Ideology* (1979); W. Abercrombie, S. Hill & B. Turner, *The Dominant Ideology Thesis* (1980); G. Therborn, *The Ideology of Power and the Power of Ideology* (1980). Although these are the key works in the field, they remain *terra incognita* for all the critical legal scholars.

the necessity of descending into the mean streets of historical research (let alone the coal mines historians frequently mention as metaphors for their place of labor), where historians “are always handling facts in bunches and in series,” as Thompson insists. Within this framework, a film industry is by definition an ideological state apparatus. Films “represent” ideology and “interpellate” individuals as subjects. Ideology flows smoothly from its source (whether this is the state, the bourgeoisie or capitalism, or a compendium of all three, is not often clarified or specified) through the film production and distribution process into the spectator’s willing eyes and ears. From the elevation of this theoretical stance, the work that historians do—researching questions of historical agency, of conflict and transformation—becomes more or less immaterial.¹³

This is a small but important segment of his overall analysis of what has been useful or promising, as well as what has been rejected or misconceived, within American film studies—particularly in relation to the simplistic and reductionist “critique of ideology” in film history. Fortunately for this discipline, the unexamined relationship between film content and the actual process of film consumption can no longer be glossed over. The emphasis on ideology has given way to a new respect for the complexity inherent in the way people actually put culture to use in their lives. The addition to scholarly deconstruction of popular cultural “texts” in terms of straightforward ideological messages has given way to a greater interest in how popular culture may tell us something about the way in which a society conceives of itself. A more modest emphasis on reflection theories as opposed to ideological power theories seems to characterize much current film historical research.

Another response to the fashionable schools of ideological critique is provided by Anne Karpf, in her review of recent developments in British film history:

The discovery of pleasure as a respectable research topic is one of the most striking developments in recent media research. Where once ideology was assumed to be mass culture’s organizing principle, and the pernicious effects of all but a handful of media texts were taken (literally and metaphorically) as read, now researchers are falling over each other to reclaim hitherto derided genres, and account for and legitimate their popularity. This rehabilitation of the audience is a valuable development. . . .¹⁴

There are problems with this renewed interest in the history and sociology (as opposed to ideology) of mass media, but many film and popular cul-

13. Sklar, *Oh! Althusser! Historiography and the Rise of Cinema Studies*, 41 *Radical Hist. Rev.* 11, 13 (April 1988).

14. Karpf, Book Review, 9 *Media Culture & Soc.* 119 (Jan. 1987).

ture scholars have taken the right step, away from simply reading pernicious effects into the unmediated contents of popular works. Unfortunately, the same can not yet be said with regard to another form of critical theory, this one with even closer relations to current analysis of popular legal culture: Critical Legal Studies (CLS).

III. LEARNING FROM EXPERIENCE: CRITICAL LEGAL STUDIES

Just as a real familiarity with some of the wrong turns taken in the past fifteen years of film historical scholarship can save a great deal of time in any initial effort to develop a critique of popular culture in the U.S., a brief survey of the contradictions within CLS theory might also prove useful. Since reference to any *brief* survey of CLS seems hopeless, I am content to provide an illustration of just one central contradiction within CLS which has immediate relevance to writing about popular culture.

Stanford law professor Robert Gordon, a leading CLS spokesperson, describes a new book by his colleague Mark Kelman as a kind of critical legal handbook, "an excellent, though demanding, introduction to C.L.S. ideas."¹⁵ Reviewing Kelman's handbook for a radical political periodical, critic George Scialabba chooses to quote key passages from Kelman's work as a summary of his (and CLS's) central insight. Legal rules, so goes the critique, "are part of a collective effort to pacify and reassure us that we have been delivered from existential tragedy. Rules are the opiate of the masses."¹⁶

It is clear that the central insight of CLS is that legal rules and liberal legal reasoning as a whole are the source of "false consciousness" in American society and have prevented Americans from perceiving their situation as one of true exploitation. Marx, of course, had something different in mind. For him, religion was not "false consciousness" but rather, a thin blanket against the bone-chilling winds of an austere capitalist society. Marx and Engels identified the role of religion/opium in terms of "the spirit of spiritless conditions," and "the heart of a heartless world." It is difficult to imagine how anyone could regard the rule against perpetuities, the doctrine of contributory negligence, the parol evidence rule, the doctrine of piercing the corporate veil or many other legal rules and doctrines as "the spirit of spiritless conditions." To argue that the technical rules of doctrinal law systematically dissected within CLS writing are *even known* to Kelman's "masses" (let alone regarded by them in the same way Marx felt religion might be regarded) is to argue a proposition which truly "surpasses experience" and constitutes the critical scholar's

15. Gordon, *Law and Ideology*, 3 Tikkun 14, 86 (Jan./Feb. 1986).

16. M. Kelman, A Guide to Critical Legal Studies 63 (1987), *quoted in* Scialabba, *Critical Legal Studies: Rules as Pacifiers of the Masses*, Zeta Mag., May 1988, at 64, 65.

own blind spot, an ideology immune to analysis. Indeed, it might be more appropriate to argue that in America today, the opium of the people is not legal rules (as Kelman would have it), but rather, *opium* (drugs, alcohol, etc.).¹⁷

However familiar this critique of law as false consciousness and deceptive ideology may have become to readers of law reviews—or even those familiar with more popular media—little effort has been made until quite recently to subject the CLS “dominant ideology thesis”¹⁸ to any sort of serious historical and sociological scrutiny.¹⁹ Thus a thesis about the infinite manipulability of public consciousness which has been sharply rejected by important contemporary historical sociologists²⁰ and systematically criticized within American film historiography²¹ has only now, after a decade of inflated CLS doctrinal exegesis (and revelation), finally been challenged.²²

My concern here is simply that an emerging school of popular legal culture criticism should avoid the dominant ideology thesis as a central focus of research into how law, lawyers, and popular discourse interact. For example, in an otherwise interesting and detailed account of the history of lawyers and the police as television heroes, one current law review investigator asserts that not only is there a general relation between the way Americans have viewed lawyers and the police over the last several decades and the way popular culture interprets these figures but that, in fact,

[what] these television depictions of zealous police tactics *translate*

17. On the CLS notion of ideology as false consciousness, see, e.g., Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276, 1295 (1984). But see Williams, *Law, Deconstruction and Resistance: The Critical Stance of Derrida and Foucault*, 6 Cardozo Arts & Ent. L.J. 359, 407 (1988) (questioning whether critical demystification undermines anything). On Marx and religion/opium see 3 K. Marx & F. Engels, *Collected Works* 175 (1976); Chase, *Law and Ideology Critique Under Spiritless Conditions: A View of the Reagan Years*, 17 Cap. U.L. Rev. (1988); see also E. Hobsbawm, *The Age of Revolution 1789-1848*, at 229 (1962).

18. See W. Abercrombie, S. Hill & B. Turner, *supra* note 12.

19. But for the inevitable exceptions, as well as crucial social realism, see J. Hurst, *The Growth of American Law: The Law Makers* 249-50 (1950) (“People in the United States of all social levels and at all times mingled respect for law and for doing things in a legal way with an unashamedly practical attitude toward the law as an instrument. They would use it when it effected a purpose and otherwise dispense with it more or less openly.”); see also Kaplan, *Lawyers Get No Respect: But Law Journal Poll Shows New Yorkers Satisfied with Legal Services*, N.Y.L.J., May 23, 1988, at 1 (contrasting popular attitudes toward lawyers with satisfaction experienced by clients); H. McClosky & J. Zaller, *The American Ethos: Public Attitudes toward Capitalism and Democracy* (1984) (reporting on continuing American cynicism with respect to the alleged neutrality of the legal system with a sizable majority believing that corporations and the rich really run the country and “a fair number of the respondents” believing that “the laws mostly favor the rich.”); Navarro, *Social Movements and Class Politics in the US*, *Socialist Register* 425, 430 (R. Miliband, L. Panitch & J. Saville eds. 1988).

20. See, e.g., M. Mann, *supra* note 12, at 23.

21. See, e.g., Sklar, *supra* note 13.

22. See, e.g., Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988). For initial treatment of these issues see Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379; Chase, *A Challenge to Workers' Rights*, 8 Nova L.J. 671 (1984).

into is increased public support for both the weakening of constitutional protections, which impede prosecution, and the overall strengthening of law enforcement mechanisms. As public sentiment moves more in line with the “crime control” model of law enforcement and less in line with the “due process” model, *largely due to the influence of television*, it becomes less likely that extralegal police actions directed against criminal suspects will draw censure or even disapproval from large segments of the American public, who perceive such conduct as effective law enforcement.²³

In effect, the author adds two and two and comes up with five. On the one hand, he attempts to demonstrate *interpretively* that there have been certain transformations in popular culture over time. On the other hand, he tries to show, utilizing *empirical* data, that there have been certain changes within public opinion over the same period regarding the cultural images of police and lawyers. Even assuming that one finds convincing the separate trajectories of development that the author lays out, there is virtually no reason whatsoever to believe that the changes in public opinion were all simply a product of the changes in motion picture or television images. To be sure, it is hard to disagree with the proposition that changes in American criminal justice and in the actual experience of crime by citizens *who also watch television occasionally* will eventually show up in some form on television. Advertisers and program producers do conduct market research to determine what the vast television audience might be willing to buy.

To make the opposite claim, however, that changes in American views on crime, lawyers, police, the courts, and so forth, are simply the result of one influence, television, is to repeat the kind of mistake identified above as characteristic of all “dominant ideology” approaches. Focus on text and textual interpretation overwhelms social context and the real complexity of human experience in society. A review of Peter Biskind’s study of Cold War films sums up this point quite nicely:

Seeing Is Believing offers a lot of information about what the scenarios written in the 1950s were trying to tell us. But it offers practically nothing in the way of conclusion. Biskind’s thesis is a play that lacks a third act. Once he has accurately identified the overt or hidden message of a film, we are to assume, I suppose, that masses of people received the message and swallowed it. We are left to fill in the blanks and to wrestle with the elusive questions of cause and effect Biskind has bypassed. . . . In other words, why do some messages we receive from films—in any decade—bounce off us, while others sink in? What happens to all the conflicting messages we absorb in the dark? Were the films of the 1950s reflecting us

23. Stark, *supra* note 1, at 280 (emphasis added).

more than we were reflecting them? *And is it just possible that the films we see have relatively little influence on us at all*—that seeing is not believing?²⁴

One need only substitute “CLS” for “Biskind” and “hidden message of a judicial opinion” for “hidden message of a film” in this critique for the analysis to reveal the aporias of CLS theory. Popular culture reflects us more than we reflect it and neither movies nor legal ideology have dominated modern history. To ignore completely not only what happened in history but also popular culture formats presenting lawyers other than in television police or trial dramas (e.g., in soap operas) is to radically short-change the richness of resources at hand.²⁵

IV. STATE OF THE ART

Thus a critique of human and popular voice in legal discourse provides a bridge into the universe of popular legal culture. Learning from the experience of both American film scholarship and critical legal studies helps us to avoid one of the key errors in the recent history of cultural criticism. Now it becomes possible to outline a range of possible choices within cultural theory. First, obviously, we have ideology critique. Despite its weaknesses, it still survives. Reviewing a recent collection of essays on American popular culture edited by Paul Buhle, Alan Milchman argues:

The supposed evidence of a mass media awash with the rumblings of anti-capitalist discontent and subversion, reflecting the creativity of the masses in their daily lives, strikes me as so much evidence for the totalitarian domination of capitalism over the “leisure” activity of the mass of the population. Indeed, sadly, I have found nothing in this collection to challenge my conviction that the mass media is capital’s organ of mass manipulation.²⁶

Milchman adds that he does not mean to imply that capitalism is capable of incorporating all opposition, but rather that radical consciousness “cannot manifest itself in the mass media, in an intact autonomous popular

24. Johnson, *The Lonely Crowd at the Movies*, *The Nation*, Dec. 10, 1983, at 606, 607-08 (emphasis added).

25. See, e.g., R. Allen, *Speaking of Soap Operas* (1985); Allen, *On Reading Soaps: A Semiotic Primer*, in *Regarding Television* 97 (E. Kaplan ed. 1983); Modleski, *The Rhythms of Reception: Daytime Television and Women’s Work*, in *id.* at 67; Chase, *Toward a Legal Theory of Popular Culture*, 1986 *Wis. L. Rev.* 557-559. On serious problems with all theories which take for granted the relation between content analysis (whether of appellate case decisions or television crime shows) and a presumed master plan of social control and ideological sorcery, see Aufderheide, *Ollie North’s Boss*, *Christianity & Crisis*, Sept. 14, 1987, at 290, 292. Making the identical point with respect to lawyers and popular culture, see Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 *Am. B. Found. Res. J.* 281, 300.

26. Milchman, *Book Review 6 Socialism & Democracy* 198, 203 (Spring/Summer 1988).

culture as was possible in preceding epochs.”²⁷ Leaving aside Milchman’s reference to the popular culture of “preceding epochs,”²⁸ we may regard his observation not only as an instance of residual ideology critique but, also, as a source for identifying its antithesis, what I call “weak-link critique” or an analysis which conceives of popular culture as the potential source of breakthroughs in popular consciousness of oppression and corruption. Seen this way, far from constituting the social imaginary of capital’s domination, popular culture becomes a field of combat. Popular culture turns the dominant ideology thesis on its head and reappears within theory as the weak link in world capitalist socialization and manipulation. Here, it is argued, real breakthroughs in consciousness are possible.²⁹ I prefer the weak-link theory to ideology critique, not so much because it somehow gets closer to the truth of modern living but because it contains within it a grand *permission* to actually enjoy the works of popular artists, to love the world we hate (“lost in its wretchedness”).³⁰

Perhaps the best reason for questioning *both* of these approaches to popular culture, however, is that they tend to cancel each other out. Popular culture cannot simply constitute a form of ideological domination if instances of revolutionary subjectivity can be identified lurking within various genres or particular narratives drawn from the popular pantheon. Nor can popular culture constitute a generally alternative vision of society if much of its content is determined by those in power (mediated through the corporate structure of the entertainment industry), and many of its consequences can be seen as a kind of pacification program. The notion that contradiction is at the heart of popular culture tends to marginalize these two initial approaches to critique.

The tendency for each of these total critiques to erode or eliminate its opposite is particularly revealed where ideology critique and weak-link theory come up with diametrically opposite readings of precisely the same cultural or popular texts.³¹ There is simply too much potentially radical

27. *Id.* at 204.

28. Debate over the nature of “preceding epochs” in the history of popular culture, specifically over whether ethnic social groups have actually enjoyed an “intact autonomous” popular culture, is as interesting as it is intense. See Sklar, *supra* note 13; see also Allen, *Motion Picture Exhibition in Manhattan: Beyond the Nickelodeon*, 18 Cinema J. 2 (Spring 1979); the discussion between Allen and Charles Musser at 10 Studies in Visual Communication 24 (Fall 1984); Mayne, *Immigrants and Spectators*, 5 Wide Angle 32 (1982); Hansen, *Early Silent Cinema: Whose Public Sphere*, 29 New German Critique 147 (Spring/Summer 1983).

29. See, e.g., Popular Culture in America (P. Buhle ed. 1987); Jump Cut: Hollywood, Politics, and Counter-Cinema (P. Steven ed. 1985); The Cineaste Interviews: On the Art and Politics of the Cinema (D. Georgakas & L. Rubenstein eds. 1983); Cinema and Social Change in Latin America: Conversations with Film-Makers (J. Burton ed. 1986); C. MacCabe, Godard: Images, Sounds, Politics (1980); S. Harvey, May '68 and Film Culture (1978); J. Street, Rebel Rock: The Politics of Popular Music (1986).

30. Pasolini, *supra* note *, at 11.

31. Cf. A. Dorfman, *Of Elephants and Ducks*, in The Empire's Old Clothes: What the Lone Ranger, Babar, and Other Innocent Heroes Do to Our Minds 17 (1983); Kunzle, *Introduction to How to Read Donald Duck*, in American Media and Mass Culture: Left Perspectives 516 (D. Lazere

critique within popular culture for us to be persuaded by the dominant ideology thesis, but there is also too much "social imaginary" for us to anticipate that most of popular culture can become the vanguard in subversion of consumer society.³²

A third basic approach to the study of popular culture is essentially materialist in the sense that it emphasizes the place of popular culture as an industry located within the general economic and productive structure of society. "As a matter of general theory," remarked the late Raymond Williams, "it is useful to recognize that means of communication are themselves means of production,"³³ and, added Williams, "the means of communication have a specific productive history, which is always more or less directly related to general historical phases of productive and technical capacity."³⁴ Thus far, research in this field has been predominantly empirical, tending to represent "specialized technical studies of what are seen as new 'media'—from writing to alphabets through printing to motion pictures, radio and television. Much indispensable detail has been gathered in these specialist histories, but it is ordinarily relatively isolated from the history of the development of general productive forces and social orders and relationships."³⁵ Unless it can be clearly shown how means of communication, as means of production, necessarily constrain the symbolic form and content of what is communicated, in relation to historical phases of productive and technical capacity, then this particular emphasis may occlude the symbolic and allegorical politics of popular culture.³⁶

ed. 1987); Wagner, *Donald Duck: An Interview*, 7 *Radical America* 1 (1973); Uncle Scrooge: The Mines of King Solomon (1987 reissue of 1950s comic book art by Carl Barks for Disney comics); Uncle Scrooge: Back to the Klondike (also a 1987 reissue); "Disney DuckTales: Armstrong," *DuckTales* (directed by Alan Zaslove & written by Michael Keyes for Disney Animation, 1987).

32. For a sampling of the range of this literature see S. Ewen, *Captains of Consciousness: Advertising and the Social Roots of Consumer Culture* (1976); S. Ewen & E. Ewen, *Channels of Desire: Mass Images and the Shaping of American Consciousness* (1982); cf. T. Lovell, *Pictures of Reality: Aesthetics, Politics and Pleasure* (1983); B. Nichols, *Ideology and the Image* (1981); J. Radway, *Reading the Romance: Women, Patriarchy, and Popular Literature* (1984); E. Rapping, *The Looking Glass World of Nonfiction TV* (1987); K. Worpole, *Dockers and Detectives* (1983); Lippard, *Sniper's Nest: Ethnic Images*, *Zeta Mag.*, April 1988, at 70; Gitlin, *The Talk about Amerika: Post Mortem on the Politics and Antipolitics of Network Television*, 2 *Tikkun* 14 (1987); Hitchens, *American Notes*, *Times Literary Supplement*, Nov. 14, 1986.

33. Williams, *Means of Communication as Means of Production*, in *Problems in Materialism and Culture* 50, 50 (1980); see also *The American Film Industry* (T. Balio ed. 1976); *The Hollywood Film Industry* (P. Kerr ed. 1976); L. Febvre & H.-J. Martin, *The Coming of the Book: The Impact of Printing 1450-1800* (D. Gerard trans. 1976).

34. Williams, *supra* note 33, at 50.

35. *Id.* at 53-54.

36. See T. Whiteside, *The Blockbuster Complex: Conglomerates, Show Business, and Book Publishing* (1981); P. Gedin, *Literature in the Marketplace* (G. Bisset trans. 1977); W. Benjamin, *The Author as Producer*, in *Reflections: Essays, Aphorisms, Autobiographical Writings* 22 (E. Jephcott trans. 1978); Lacy, *The Economics of Publishing, or Adam Smith and Literature*, in *The Sociology of Art and Literature: A Reader* 407 (M. Albrecht, J. Barnett & M. Griff eds. 1970); Radway, *The Book-of-the-Month Club and the General Reader: On the Uses of "Serious" Fiction*, 14 *Critical Inquiry* 516 (Spring 1988). Each of the works cited here deals in one or another way with how means of communication, conceived as productive means, may constrain the actual expression of works themselves. See also F. Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (1981).

A fourth approach to popular art analysis derives from an attitude toward culture reflected in comments such as those of Pasolini on art's seductive qualities or of Karpf on the pleasures of the text.³⁷ As distinct from ideology, weak-link, and means of production critique, this view conceives of culture generally as something rather abstract and removed from the straightforward political positions and societal controversies which threaten social cohesion. In an odd way all art may contribute to ultimate social stability in this critique. Peter Bürger suggests that

[with] the help of Herbert Marcuse's theoretical formulation concerning the twofold character of art in bourgeois society. . . , the avant-gardiste intent can be understood with particular clarity. All those needs that cannot be satisfied in everyday life, because the principle of competition pervades all spheres, can find a home in art because art is removed from the praxis of life. Values such as humanity, joy, truth, solidarity are extruded from life as it were, and preserved in art. In bourgeois society, art has a contradictory role: it projects the image of a better order and to that extent protests against the bad order that prevails. But by realizing the image of a better order in fiction, which is semblance (*Schein*) only, it relieves the existing society of the pressure of those forces that make for change. They are assigned to confinement in an ideal sphere.³⁸

I find this argument—in fact, Bürger's whole approach to the history of culture and the specific problematic of the avant-garde—to be original and helpful. It is useful here, however, to *avoid* debates over how Marcuse's aesthetics may have altered over time³⁹ or whether Bürger or Habermas more perfectly understands the politics of contemporary avant-garde culture,⁴⁰ and to be content with identification of this fourth approach to popular art, what we might call (*pace* Marcuse) "affirmative critique."⁴¹ We will not even touch the salient question of whether a popular culture that provides enormous gratification to consumers in exchange for ultimate social pliancy or political lethargy can, in any significant way, be regarded as "affirmative," unless we mean, as Marcuse appeared to mean, that it affirms only the status quo. Instead, I will simply observe the basic discrepancy between *levels of access* to consciousness found in ideology critique as opposed to affirmative critique.

on the "symbolic and allegorical politics of" art and culture.

37. See *supra* notes * & 14.

38. P. Bürger, *Theory of the Avant-Garde* 50 (M. Shaw trans. 1984).

39. See, e.g., T. Lukes, *The Flight into Inwardness: An Exposition and Critique of Herbert Marcuse's Theory of Liberative Aesthetics* (1985); Bokina, *Book Review*, 68 *Telos* 164 (Spring 1986) (reviewing Lukes).

40. See, e.g., Habermas, *Modernity Versus Postmodernity*, 22 *New German Critique* 3 (Winter 1981); Bürger, *Avant-Garde and Contemporary Aesthetics: A Reply to Jürgen Habermas*, 22 *New German Critique* 19 (Winter 1981).

41. See Bürger, *supra* note 38, at 12-13.

The fifth approach to popular culture and the one which best characterizes the following effort to map law and the popular arts may be referred to as the "sociology of culture." This category has been given such broad intellectual jurisdiction in recent decades that even a selective bibliography would far outrun the length of this essay. The two main aspects of this fifth approach, for my purposes, are (1) a willingness to consider both intuitive and more empirical or systematic kinds of knowledge and insight, and (2) an effort to juxtapose an individual work or instance with a broader form of social reality, what Fredric Jameson calls "jumping of a spark between two poles."⁴² Jameson provides an intriguing illustration of this method of juxtaposition from the writing of Theodor W. Adorno:

It is hardly an accident that mathematical techniques in music as well as logical positivism originated in Vienna. The fondness for number games is as peculiar to the Viennese mind as the game of chess in the coffee house. There are social reasons for it. All the while intellectually productive forces in Austria were rising to the technical level characteristic of high capitalism, material forces lagged behind. The resultant unused capacity for figures became the symbolic fulfillment process of the Viennese intellectual. If he wanted to take part in the actual process of material production, he had to look for a position in Imperial Germany. If he stayed home, he became a doctor or a lawyer or clung to number games as a mirage of financial power. Such is the way the Viennese intellectual tries to prove something to himself, and—bitte schön!—to everyone else as well.⁴³

My point is not that Adorno's specific analysis here is "correct"—rather that the sociology of culture includes just the kind of critique which Adorno deploys in his attempt to decipher the aesthetic and intellectual pastimes of Viennese society. And it is this sort of critique with which I

42. F. Jameson, *Marxism and Form: Twentieth-Century Dialectical Theories of Literature* 4 (1971).

43. T. Adorno, *Philosophie der neuen Musik* (1958), *quoted in id.* at 7. For an historian's effort in the sociology of culture see R. Evans, *Death in Hamburg: Society and Politics in the Cholera Years, 1830-1910* (1987). Gordon Craig comments on how Evans uses the cholera years, in particular the 1892 cholera epidemic in Hamburg, to reveal the larger contours of society and politics in the late nineteenth century. Craig, *Politics of a Plague*, N.Y. Rev. Books, June 30, 1988, at 9, 9-10. Evans specifically juxtaposes the bourgeoisie's preference for *miasmatic* theory of cholera's spread (a preference which led to an undervaluation of *contagion* theory and Koch's discovery of the cholera bacillus as well as perhaps thousands more deaths) with the bourgeoisie's existing emphasis upon *sanitation* and *sobriety* as solutions to the physical and moral degradation of the poor at the hands of an expanding industrial capitalism, an ominous politicization of epidemiology with obvious implications for present history. *Id.* at 10-11. See also Chase, *Fear Eats the Soul*, 94 Yale L.J. 1253 (1985) (similar effort within the sociology of culture to juxtapose point with Gestalt field, in this case the resistance of late-nineteenth century British common law judges to recognize the defense of necessity in criminal cases involving survival cannibalism—in spite of precedent and legislative recommendations favoring recognition—with the vaster social reality of late-Victorian English political, cultural, and sexual values and sentiments).

feel most comfortable in trying to link together the "two incommensurable realities" of American popular culture and law and the legal profession.

Beyond this necessarily brief excursion into the range of choices offered by contemporary cultural criticism, this set of five divergent styles of *critique*, it is also useful to observe that there are many prevalent *techniques* currently utilized within cultural criticism. These *techniques* constitute relatively autonomous investigative tools and thus, not surprisingly, cut across the boundaries created by the notions of *critique* advanced above. Such techniques certainly include psychoanalytic,⁴⁴ semiological,⁴⁵ authorship (or "*auteur*"),⁴⁶ and genre-based theory,⁴⁷ as well as criticism which takes the star system in the movies⁴⁸ as its point of departure. If I have not chosen these particular techniques for immediate use here, it is not because they cannot be usefully employed in the study of law and popular culture. On the contrary, all of the techniques cited either have or soon will have been put to use in analyzing popular legal culture. I have chosen the technique of gender-based analysis as an entry point to the sociology of culture simply because the example of popular legal culture selected here, Scott Turow's novel *Presumed Innocent*, makes gender-based theory and its implications difficult to escape. The technique remains, at the same time, no more than a single corridor into the great hall of culture's sociology.

V. GENDER-BASED THEORY

One of the most widely practiced forms of gender-based theory, "images of women" criticism,⁴⁹ is now regarded by some feminist theoreticians as rather primitive. To be sure, no critical perspective in the U.S. has developed more rapidly or with greater sophistication over the last two decades

44. See, e.g., C. Metz, *The Imaginary Signifier: Psychoanalysis and the Cinema* (C. Britton, A. Williams, B. Brewster & A. Guzzetti trans. 1982); E. Wright, *Psychoanalytic Criticism: Theory in Practice* (1984); *Literature and Psychoanalysis, the Question of Reading: Otherwise* (S. Felman ed. 1982); K. Gabbard & G.O. Gabbard, *The Psychiatrist at the Movies*, in *Psychiatry and the Cinema* 175 (1987); Holland, *Schizoanalysis: The Postmodern Contextualization of Psychoanalysis*, *Marxism and the Interpretation of Culture* 405 (C. Nelson & L. Grossberg eds. 1988); *The Trials of Psychoanalysis*, 13 *Critical Inquiry* 215 (Winter 1987).

45. See, e.g., S. Heath, *Questions of Cinema* (1981); C. MacCabe, *Tracking the Signifier, Theoretical Essays: Film, Linguistics, Literature* (1985).

46. See, e.g., *Cahiers du Cinéma: The 1950s, Neo-Realism, Hollywood, New Wave* (J. Hillier ed. 1985); C. Crisp, *Preface to Eric Rohmer: Realist and Moralism* (1988).

47. See, e.g., Chase, *supra* note 25, at 563-67; H. Dubrow, *Genre* (1982); *Film Genre Reader* (B. Grant ed. 1986); S. Neale, *Genre* (1980); U. Eco, *Travels in Hyper Reality* (W. Weaver trans. 1986).

48. See, e.g., Elsaesser, *Film History as Social History: The Dieterle/Warner Brothers Bio-Pic*, 8 *Wide Angle* 15, 16 (1986, No. 2) ("During the three decades from 1930 to 1960, genres and the star system supplied the main discourses whereby the Hollywood film industry communicated with its audiences."); King, *Stardom as an Occupation* in *The Hollywood Film Industry* 154 (P. Kerr, ed. 1986).

49. See T. Moi, "Images of Women" Criticism, in *Sexual/Textual Politics: Feminist Literary Theory* 42-49 (1985).

than has feminist theory.⁵⁰ But just as the images of women perspective has provided a starting point in the past for some figures transforming feminist criticism today, it may still provide a starting point for those unfamiliar with gender-based analysis of literature and culture. Further, gender-based theory will be used here in a way which, hopefully, avoids some of the criticism of "images of women" cultural analysis.

In a recent, important overview, feminist critic Toril Moi argues that "to study 'images of women' in fiction is equivalent to studying *false* images of women in fiction written by both sexes. The 'image' of women in literature is invariably defined in opposition to the 'real person' whom literature somehow never quite manages to convey to the reader."⁵¹ On the one hand, the value in such an approach to literature, according to Moi, is that it emphasizes "the way in which writers constantly *select* the elements they wish to use in their texts."⁵² Thus, applied to Scott Turow's novel, "images of women" criticism has the advantage of reminding us that the women in *Presumed Innocent* are not "real women" whom we might feel compelled to defend or criticize but are, in fact, simply creations of a particular male novelist's imagination, rendered within a particular work of his. In a sense, what may require defense is not what Turow's women do but rather why he chooses to have them engage the world as they do. Turow's relationship to his female characters, or the relationship between actual American women and those reconstructed in the imaginative art of male novelists, may turn out to be more important or more revealing than any of the relationships between characters within a particular novel.

On the other hand, Moi is primarily interested in raising sharp questions about images of women critique, and I, having already expressed my own concern with the tendency of some critics to overestimate the impact of legal ideology (or ideology conveyed through popular art and elite culture) on the way most people actually live, am inclined to agree with Moi's observation that

[l]iterary works can and should of course be criticized for having selected and shaped their fictional universe according to oppressive and objectionable ideological assumptions, but that should not be confused with failing to be 'true to life' or with not presenting 'an authentic expression of real experience.' Such an insistent demand for authenticity not only reduces all literature to rather simplistic

50. See, e.g., Abraham, *Modern Romancers*, *The Nation*, July 2/9, 1988, at 27, 27. For the extraordinary developments within legal studies in even less time, see *Women in Legal Education—Pedagogy, Law, Theory, and Practice*, 38 J. Legal Educ. 1 (March/June 1988); C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U.L. Rev. 1065 (1985).

51. T. Moi, *supra* note 49, at 44-45.

52. *Id.* at 45.

forms of autobiography, it also finds itself ruling the greater part of world literature out of bounds.⁵³

Even if an author's characters do not strike a reader as somehow "true to life," it does not follow that there must be one, "correct" method of arriving at some form of truth in or through art—and that, in a particular case, the novelist or filmmaker or painter has unfortunately failed to embrace it. "An insistence on authenticity and truthful reproduction of the 'real world' as the highest literary values inevitably makes the feminist critic hostile to non-realist forms of writing," concludes Moi, adding that there simply is "no automatic connection between demands for a full reproduction of the totality of the 'real' and what is known as 'realist' fiction."⁵⁴ In other words, there is more than one set of formal means to get at reality, including the politics of gender. For example, as Brecht suggested early in this century, at no other time in history had realism told us so little about reality.

I am not preparing a circuitous defense of *Presumed Innocent* in terms of gender critique or on "non-realist formal" or aesthetically elaborate grounds. I am, in fact, convinced that by taking Turow's women (or his *construction* of women) seriously, by remaining conscious (as Moi argues we should) of Turow as master of fictional selection, we can more precisely situate *Presumed Innocent* within the context of other manifestations of popular legal culture during the last few years. Indeed we can do so (keeping Moi's reservations in mind) *without* having to rely on a narrowly conceived theory of "true to life" fiction which mechanically distinguishes between allegedly authentic and inauthentic writing. We can do so without requiring Turow to write only autobiography (observed reproduction of life) or to become a sociologist of women in the professional workplace; without confusing images of women criticism and the real argument about women and freedom, which surely goes beyond the decoding or deconstruction of books and movies into the reality of politics; without, in the end, claiming to have exhausted critical assessment of *Presumed Innocent* itself.

What would the author's reaction be to an approach to reading his work through the lens of "images of women" criticism? We have an idea. Appearing as part of the promotion for paperback release of *Presumed Innocent* throughout the country during June, 1988, Turow answered questions on a Cable News Network broadcast of the Larry King Show. King, like nearly every reviewer of *Presumed Innocent* I am aware of,⁵⁵

53. *Id.* at 45-46.

54. *Id.* at 47.

55. One reviewer, novelist Anne Rice, refers to Turow's markedly unsympathetic female principals, but her very modest complaint is drowned by an ocean of silence from other critics, both legal and literary, regarding images of women in *Presumed Innocent*. See, e.g., Wright, *The Fictional Lawyer*, 33 *Practical Lawyer* 90 (Sept. 1987); Lehmann-Haupt, *Books of the Times*, N.Y. Times,

simply did not raise the issue of Turow's treatment of women in his novel. The first caller, a woman from Seattle, Washington, did. She argued that the women drawn by Turow in his portrait of a big city legal system all fit a narrow type, and complained that "the only sympathetic woman in your book was the murderer who the protagonist protects." King then invited Turow to respond to "criticism of the way you write women." "Well," Turow paused, "You know . . . I . . . I've obviously heard the criticism before . . . I don't agree with the particular characterization of the women in *Presumed Innocent*." He suggested that there were women in his book who were admirable as well as otherwise and concluded by saying the important point was that the same thing could be said of the men he had created. First, if Turow *had* heard the criticism before, he still did not seem to have a ready explanation. Second, he seemed to agree that such a criticism would "obviously" be raised. Third, to describe a book as having both admirable and less than admirable men as well as women in it describes virtually *all* books (including those most generally criticized for being misogynist) which actually have both men and women characters in them. But none of this gets to the real problem.

In spite of a wide panorama of characters practicing the arts of urban amorality, even sexual barbarism, there really are only four central figures in *Presumed Innocent*: two men and two women. The relationship between the men, in this particular kind of American fiction, tends to require a certain form of relationship between the women. The narrator and protagonist of the novel, the jaded but nevertheless honest prosecutor who retains his integrity and sanity even while he becomes a defendant in a sensational murder trial, is Rosat K. "Rusty" Sabich. Rusty describes Lipranzer, a police detective, the one person in the world he can genuinely trust, this way:

"My best friend," I wrote, "is a cop. He is five foot eight inches tall, weighs 120 pounds after a full meal, and has a duck-ass hairdo and that look of lurking small-time viciousness that you've seen on every no-account kind hanging on a street corner. He smokes two packs of Camel cigarettes a day. I do not know what we have in common, but I admire him. He is very good at what he does. . . ." In practice, he is as solitary as a shooting star. . . . Lip spends most of his time alone, hanging out in bars and on loading docks, drinking shots with anybody who's got good information—hoods, reporters, queers, federal agents, anybody who can keep him up to speed on the world of big-time bad guys.⁵⁶

With these lines, on page twenty-one of the novel, *Presumed Innocent*

June 15, 1987, § C, at 15, col. 1. This situation will no doubt change as women law professors begin to find time to react in print to Turow's perspective.

56. S. Turow, *Presumed Innocent* 21 (1987).

effectively ends. From this point on, everything runs true to a familiar brand of American men's writing; Rusty and Lip are not "queers" (far from it: gays and racial minorities seem disfavored by the good soldiers of law and order in Kindle County) but their relationship constitutes the romance at the heart of Turow's book. From Rusty's characteristic reverie about his buddy, a good cop, the images of women are fixed permanently on the developing paper in Turow's darkroom. After this key relationship comes into focus, Turow more or less reproduces a kind of Hemingway or Faulkner script, a story of male bonding, the endless struggle of heterosexual American men against loneliness, anxiety, women, and death. Turow almost seems to have used Leslie Fiedler's *Love and Death in the American Novel*⁵⁷ as a form of cookbook while concocting this retelling of Cooper's *Leatherstocking Tales*, this reworking of themes from *The Sun Also Rises* or from Don Siegel's 1964 motion picture *The Killers*, only now in the guise of a story about lawyers and American justice.

Thus the caller from Seattle on the Larry King Show, concerned about the way Turow painted his women characters into the sprawling corruption of an urban canvas (indeed, "hog butcher to the world" in *Presumed Innocent*), clearly seems to me to have been on to something. For both of us, images of women provide a tipoff, a clue to what is actually going on. "Through the corrupt city," observes Leslie Fiedler, "the innocent tough guy who finally sees all, though he is slugged, doped, sapped, shot at, and bribed on the way to his vision, moves on an immaculate journey. The undraped daughters of the rich, tight-breasted virgins and nymphomaniac nightclub entertainers, tempt him with their proffered bodies, but he is faithful only to his buddies, and like Lambert Strether, to 'what is right.'"⁵⁸ That Rusty Sabich sees all the city has to offer on his arduous journey to an acquittal is undeniable. Every form of bribery and temptation throws the plot for another loop and further obstructs Rusty's angle of vision on good and evil.

That he submits to one "undraped daughter" of the law, a very seductive female prosecutor, only makes his eventual return to Lip, to the shining path ("what is right"), that much more satisfying. The woman with whom Rusty is obsessed, Carolyn Polhemus, is "wicked . . . naughty . . . up to no good,"⁵⁹ the kind of woman who uses sex like a flyswatter, an-

57. L. Fiedler, *Love and Death in the American Novel* (rev. ed. 1966).

58. *Id.* at 347. Again, it should be stressed that "what is right" among men in this particular kind of American fiction *excludes* homosexual relations. Rusty and Lip are, in this regard, indistinguishable from other male action duos regarding their attitude toward sexual politics—indistinguishable, for example, from such characters as those portrayed by Clint Eastwood and Reni Santoni in Don Siegel's 1971 cop film *Dirty Harry*; see Chase, *The Strange Romance of Dirty Harry Callahan and Ann Mary Deacon*, 7 *Radical America* 20, 26 (1973, no. 1).

59. "Thornhill: How did a girl like you ever get to be a girl like you? Eve: Lucky I guess. Thornhill: Not lucky—wicked . . . naughty . . . up to no good . . . Ever kill anyone? . . . Bet you could tease a man to death without even trying. (*He pats her cheek.*) So stop trying, hm?" E. Lehman, North by Northwest 84 (1959) (screenplay). I include this characterization by Cary Grant of

other recipe drawn from the classic cuisine of American fiction. Describing the construction of Faye Greener in Nathanael West's *Day of the Locust*, Fiedler observes that Faye "is the blond bitch in all her archetypal purity, a woman willing at last to take up the role that old Rappaccini had once vainly dreamed for his daughter: 'to be endowed with marvelous gifts against which no power and strength could avail an enemy . . . to be terrible as . . . beautiful.'" "[T]he blond movie actress, a kind of *ersatz* Jean Harlowe [*sic*]," in West has simply become a big city prosecutor in Turow.⁶⁰ Of course her affair with the hero insures her rather nasty removal from the story.

Meanwhile, Rusty and Lipranzer are true cowboys in the city, happy rolling *camarados*, especially in one key sequence where they break down the door in a housing project apartment, seeking the enemy or evidence or something. What matters is that they "are good at what they do." This is Wild West Downtown, so to speak, a male ritual which could easily have been borrowed from Don Siegel's 1952 horse opera, *Duel at Silver Creek* (or innumerable other matinee pictures), where Audie Murphy, guns blazing, smashes through the front wall of one more outlaw hideout (cf. *Fort Apache/The Bronx*), only Murphy does it *riding on a horse* (putting the prosecutor and his sidekick to shame). So it goes in the male action drama, a kind of pocket part to *Argosy* magazine or *Guns & Ammo*: boy gets girl, Hart gets horse,⁶¹ Rusty gets Lip ("I never realized you carry a gun," says Sabich to his pal), and Carolyn Polhemus gets what's coming to her. "We find the lady raped and bound," says Turow's tough-talking D.A., Raymond Horgan, "[w]ith some demented slug cracking her skull."⁶² The "demented slug," of course, turns out to be Barbara, Rusty's slightly too intellectual, too brooding wife who tries to frame Rusty for her own savage elimination of Carolyn but, at the same time removes herself from the story and thus makes way for Rusty's return to what is right. "[O]ur great novelists," argues Fiedler, "though experts on indignity and assault, on loneliness and terror . . . , shy away from permitting in their fictions the presence of any full-fledged, mature women, giving us instead monsters of virtue or bitchery, symbols of the rejection or fear of sexuality."⁶³

Eva Marie Saint from Hitchcock's *North by Northwest* not only because it expresses a classic male conception of what women are up to, one shared by Rusty toward Carolyn, but also because it is drawn from a film representing a quite different genre from that of the Western or war film, backbones of the male action cinema.

60. For discussion of this perception of women by American male novelists, see L. Fiedler, *supra* note 57, at 326-27.

61. See, e.g., discussions of William S. Hart's western character in G. Fenin & W. Everson, *The Western: From Silents to the Seventies* 74-107 (1973) (Fenin and Everson, incidentally, dedicate their book to Hart); J. Cawelti, *Zane Grey and W.S. Hart: The Romantic Western in the 1920s*, in *Adventure, Mystery and Romance* 230-41 (1976).

62. S. Turow, *supra* note 56, at 8.

63. L. Fiedler, *supra* note 57, at 24.

"But what about Rusty and Carolyn in bed?" someone will ask, "What have those encounters got to do with 'the rejection or fear of sexuality'?" The sexual relationship between Rusty and Carolyn tends to confirm, rather than erode, the application of Fiedler's perspective to *Presumed Innocent*. Rusty describes his most "passionate encounter" with the lady he cannot live without in this way: "She arched, clearly in some pain. And I found, suddenly, that I was thrilled. Her head lolled back. Her eyes held tears. Then she opened them and looked at me directly. Her face was radiant."⁶⁴ This passage could be read as an interesting version of how Rusty might describe Barbara's encounter with Carolyn. Given Rusty's admission that he would prefer killing Carolyn himself if he could not possess her ("I felt the most desperate wish that she were dead"),⁶⁵ one wonders if he did not find Carolyn's corpse at the crime scene not entirely lacking in "radiance." Not much distance separates Rusty Sabich's thoughts from the sentiment expressed in T.S. Eliot's "Sweeney Agonistes": "Any man has to, needs to, wants to/Once in a lifetime, do a girl in."⁶⁶ Barbara fails in her effort to "do in" her unfaithful husband since the ever-faithful Lipranzer, at great personal risk, steals the phantom beer tumbler (which implicates Rusty but good) from the evidence room. His presentation of this trophy to Rusty as the book closes (who do we hate more: Carolyn or Barbara?) is, to borrow a title from Peter Handke, perhaps *Presumed Innocent's* only "moment of true feeling." My point is not that Turow's creation of these infinitely dangerous women fails the "true to life" litmus test; on the contrary, that his fidelity to reality does not constitute a defense.

The key to understanding the politics of *Presumed Innocent* is to recognize the way in which Turow *displaces* his critique of urban corruption, declining civic institutions, manipulation of the legal system, etc., onto a critique of sexual politics and thus *avoids* resolving contradictions raised by his treatment of lawyers and judges on the loose in the urban jungle. This is a familiar gambit, one which characterizes in outline the transition from the *proletarian* to the *tough-guy* novel in American fiction during the 1920s and 1930s. Here Turow repeats this transition but *within the specific context* of the lawyer narrative in American popular culture. The *New York Times* review of the novel found that *Presumed Innocent's* "theme is, unoriginally, the corruption of municipal politics and the paradox of rough justice arising out of a cesspool of wrongdoing."⁶⁷ It is not immediately clear what is meant by "rough justice" here (presumably Rusty's being acquitted rather than Carolyn's being murdered)—but the notion of "rough justice," arising from big-city adversarial legal practice,

64. S. Turow, *supra* note 56, at 114.

65. *Id.* at 141.

66. Quoted in Abraham, *supra* note 50, at 28.

67. Lehmann-Haupt, *supra* note 55, at 15, col. 1.

from the subtle ironies of evidentiary rules in court and client loyalty in attorney ethics, is never more than a façade for a story whose real theme is gender.

Turow thus replicates a classic move within American fiction and film, one which has for years permitted male writers and readers to conceive of themselves as outsiders, tough guys, even outlaws, without having anything to do with the real world of politics where the action inevitably is located. "As it descended the long way from Sam Spade to Mike Hammer, the proletarian thriller has come to treat the riddle of guilt and innocence even more perfunctorily, as its occasion rather than its end," observes Fiedler. As in the tough-guy thrillers, Turow provides "more and more vulgar sensationalism" and sexual voyeurism to be sure, but precisely from a kind of elite, professional, insider's perspective. Without making the mistake of attributing an omnipotence to culture, as in the dominant ideology theses, we can still suggest that misogyny in male fiction becomes a kind of *insulation* from responsibility for social change.⁶⁸

Within the modest ambitions of a sociology of culture, however, and given our rejection of both the dominant ideology thesis and the "false portrait of reality" version of images of women critique, *from what standpoint* have we gone beyond the explication of images of women in Turow's work in the direction of sharply criticizing that work? On what foundation do we stand in asserting that we are troubled by a particular work of fiction? "Criticism first appears as a denial; its basic gesture is a refusal," observes Pierre Macherey:

Yet it intends to supply a knowledge, and the authority that it appropriates should be acknowledged as decisive. . . . It expresses a knowledge, even though it might be a subjective knowledge (that contradiction in terms). . . . Criticism demonstrates its power over the work, for in the space generated by that initial gesture of refusal and separation there is born a new and perhaps different object, something which only criticism could have brought to life. Refusing to accept the given work as definitive, and emphasising rather its modifications, the critical judgment affirms the presence of the *other*, of the elsewhere which ratifies judgment.⁶⁹

It is clear that Macherey, as well as some other contemporary, left-wing critics of literature, believe it is possible to measure the quality of a literary work by a yardstick other than popularity with an affluent market of readers, technical mastery by the author of the particular literary form within which he or she is working, or fidelity to some narrowly conceived notion of "reality" or accuracy in reporting. Yet "the elsewhere

68. L. Fiedler, *supra* note 57, at 499-500.

69. P. Macherey, *A Theory of Literary Production* 16 (G. Wall trans. 1978).

which ratifies judgment" (thus criticism) for Macherey cannot be adequately located here, at the very conclusion of this introduction to how we might analyze law and popular culture. Such exploration requires a more detailed map, and more distinct figures in the landscape itself, than we have provided so far.

Nevertheless, if what is specific to the sociology of culture and what distinguishes it from other approaches to critique, is its emphasis on the relation between an individual work or instance and a broader field upon which it draws, we might seek, like Werner Herzog's relentless Fitzcarraldo, a more elaborate middle tier of analysis upon which to shoulder the analytic burden of moving from specific works to that broader field which is, ultimately, society itself. How might this be done?

Suppose we position *Presumed Innocent* at one end of a gender-based spectrum of representation (perhaps terminating at the opposite end in the images of women—lawyers, judges, crime victims and clients—in the television serial *L.A. Law*) and then proceed by attempting to generate Fredric Jameson's spark of recognition, if not between point and field, then at least between two middle tiers of analysis; between a gender-based and a genre-based spectrum of images and values. Both gender-based and genre-based series would include the same works or instances (adding critical motion pictures like *Jagged Edge*, *Suspect*, *The Big Easy*, and *Legal Eagles*). What is so striking about this middle-tier juxtaposition is that the two series can be superimposed on each other; they seem to "fit together."

Moving from *Presumed Innocent* through *L.A. Law*, in terms of a spectrum of negative to more positive images of women, we encounter the same sequence of popular works as if we were moving, on the genre spectrum, from the "police procedural" of Ed McBain (*Presumed Innocent*), through police/detective (*Jagged Edge*), detective/mystery (*Suspect*), mystery/romance (*The Big Easy*), romantic comedy/social melodrama (*Legal Eagles*), to urban or metropolitan social melodrama—the latter constituting what some might regard as the "master discourse" of popular narrative about American law and lawyers for most of this century. From the pages of Louis Auchincloss to the images in films like *The Young Philadelphians*, then to the top of the television ratings in NBC's *L.A. Law*, social melodrama has constituted an important source of information regarding American attitudes toward legal lifestyles and politics. The specific structural alterations in the genre provided by *L.A. Law* (as well as the synthesis of lawyer narrative with police procedural, an unprecedented development pioneered by Scott Turow at bestseller altitude) confirm the continuing utility of genre-based analysis for cultural theory. "The strategic value of generic concepts . . .," suggests Jameson, "clearly lies in the mediatory function of the notion of genre, which allows the coordination of immanent formal analysis of the individual text with the twin

diachronic perspective of the history of forms and the evolution of social life.”⁷⁰

From individual works of popular culture through the mediatory function performed by techniques such as gender and genre analysis, to the far shore of the evolution of social life (or, as future studies must pursue, the evolution and contemporary erosion of elite control within the American legal profession, itself a reflection of general challenges to control over the social structure of accumulation within the American political economy), I have staked out here but one of many promising lines of inquiry into the sociology of culture generally as well as, in particular, the sociology of popular legal consciousness in the United States.

70. Jameson, *supra* note 36, at 106. For a discussion of Jameson’s analysis see M. Sprinker, *Imaginary Relations: Aesthetics and Ideology in the Theory of Historical Materialism* 153-76 (1987).